IN THE SUPREME COURT OF THE UNITED STATES

May Term, 1977

No. 76-6784

CARL LAMONT BAYLESS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

****

RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

From the Supreme Court of Ohio

****

STEPHAN M. GABALAC
Prosecuting Attorney

CARL M. LAYMAN III
Assistant Prosecuting Attorney
Appellate Review Division
City-County Safety Building
53 East Center Street
Akron, Ohio 44308

216/379-5510

WILLIAM R. HOLLAND
Attorney at Law
912 Centran Building
Akron, Ohio 44308

216/535-3371

TABLE OF CONTENTS

	PAGE
Table of Authorities----------	1c
Opposition to Jurisdiction----------	2
Statement of Facts----------	3
Petitioner's First Reason for Granting the Writ - Sub-Part B	
THE OHIO DEATH PENALTY STATUTES PLACE UNCONSTITUTIONAL LIMITATIONS UPON THE CONSIDERATION OF MITIGATING CIRCUMSTANCES.----------	18
Sub-Part C	
THE OHIO DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THEY DENY THE CAPITALLY ACCUSED THE RIGHT TO A JUDGMENT OF HIS PEERS AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES, AND THE APPROPRIATENESS OF THE PENALTY OF DEATH.----------	22
Sub-Part D	
OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSIBLY PENALIZE EXERCISE OF THE RIGHT TO TRIAL BY JURY.----------	25
Sub-Part E	
OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSABLY SHIFT TO THE DEFENDANT CONVICTED OF AGGRAVATED MURDER WITH SPECIFICATIONS THE BURDEN OF PROVING FACTS WHICH DISTINGUISH THOSE WHO MAY LIVE AND THOSE WHO MUST DIE.----------	26
Petitioner's Second Reason for Granting the Writ	
PETITIONER SHOULD NOT BE PUT TO DEATH WITHOUT THE VOTE OF THE PEOPLE OF OHIO.---	28

TABLE OF CONTENTS (cont.)

PAGE

Petitioner's Third Reason for Granting the Writ

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS DENIED BY THE TRIAL COURT'S REFUSAL TO GRANT HIS CHANGE OF VENUE MOTION MADE ON GROUNDS OF PREJUDICIAL PRE-TRIAL PUBLICITY.---------- 29

Petitioner's Fourth Reason for Granting the Writ

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF EIGHT VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER"S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.------- 34

Conclusion---------- 40

Certification of Service---------- 41

TABLE OF AUTHORITIES

	PAGE
CASES CITED	
Cf. Roberts v. Louisiana, 45 L. W. 4584 June 7, 1977	19
Davis v. Georgia, __U.S.__ 50 L.Ed.2d 340	38
Jurek v. Texas, 428 U.S. 262 (1976)	20
Mullaney v. Wilbur, 421 U.S. 684 (1975)	26
Nebraska Press Association v. Stuart, __U.S.__ 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976)	32
Proffitt v. Florida, 428 U.S. (1976)	19, 24, 27
Roberts v. Louisiana, 428 U.S. 325 (1976)	19
Sheppard v. Maxwell, 384 U.S. 333(1966)	29, 30, 31, 32
State v. Fairbanks, 32 Ohio St.2d 34 (1972)	33
State v. Lockett, (1976), 49 Ohio St.2d 71	21
State v. Tingler, 31 Ohio St.2d 100 (1972)	33
Tedder v. State, 322 So.2d 908, 910 (1975)	27
United States v. Jackson, 390 U.S. 570 (1968)	25
Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S. Ct. 46, Ohio Ops.2d 368	38, 39
Woodson v. North Carolina, 428 U.S. 280 (1976)	19
CONSTITUTION	
Ohio Constitution, Article IV, Section 2	19
STATUTES	
Ohio Revised Code 2903.01	18
Ohio Revised Code 2929.03	18
Ohio Revised Code 2929.03(D)	23

TABLE OF AUTHORITIES (cont.)

	PAGE
STATUTES (cont.)	
Ohio Revised Code 2929.04(A)----------	18
Ohio Revised Code 2929.04(A)(5)----------	18
Ohio Revised Code 2929.04(B)----------	18
OTHER AUTHORITIES	
Fla. Stat. Ann., section 791.141----------	19
Fla. Stat. Ann., section 921.141(3)(Supp. 1976-1977)-------	26

OPPOSITION OF JURISDICTION

Petitioner has failed to raise an issue of constitutional dimensions, requiring review pursuant to 28 U.S.C. 1257(3).

STATEMENT OF FACTS

On the evening of February 26, 1974, between 7:00 and 8:00 p.m., the Appellant, Carl Lamont Bayless, and two friends, Sam Colvin and Sam Howze, Jr., were having a discussion in the kitchen of the Bayless home, located on Dorthy Avenue, in the City of Akron (Transcript, Volume VII, Page 1564). This conversation concerned the inspection of the Appellant's pistol (State's Exhibit 5) which was fully loaded, some of the ammunition being described by the Appellant as "scatter" bullets, i.e., bullets with flat headed projectiles (Transcript, Volume VII, Pages 1566, 1589). The Appellant explained that he had to make a hustle (obtain cash) and placed the gun on his side (Transcript, Volume VII, Pages 1565-1566, 1590).

After the inspection and conversation of the Appellant's pistol, Sam Howze, Jr. left the Bayless residence and returned to his mother's home on Bishop Street (Transcript, Volume VII, Pages 1590-1591). The Appellant and Sam Colvin left on foot for the Colvin Home, on Biruta Avenue, the Appellant and Colvin still talking about a hustle (Transcript, Volume VII, Page 1568). After having hitchhiked a ride part of the way to Colvin's house, Colvin and the Appellant split up with Colvin going home and the Appellant heading on foot in the direction of the K-Mart on Wooster Avenue (Transcript, Volume VII, Page 1569). Colvin testified that the Appellant

still had the loaded pistol in his possession, and estimated the time of the split up at approximately 8:00 p.m. The K-Mart was approximately four or five blocks from where Colvin last saw the Appellant (Transcript, Volume VII, Page 1569).

The Appellant was next seen alone on this same evening (February 26, 1974), at approximately 9:30 p.m., by Joseph Thomas (Transcript, Volume IX, Page 2124). The Appellant at this time was driving a white over black Cadillac (Transcript, Volume IX, Page 2124). The Appellant told Thomas that he had "just killed somebody" and that he " had to kill them" (Transcript, Volume IX, Page 2125). The Appellant further told Thomas that he obtained the car from the people he killed (Transcript, Volume IX, Pages 2126, 2144). Before the Appellant left, he gave Thomas an umbrella (with tape on the handle) (State's Exhibit 80) from the trunk of the Cadillac (Transcript, Volume IX, Pages 2126, 2143). After the Appellant left, Thomas found some papers in his driveway containing the name Mr. Anthony (Transcript, Volume IX, Page 2127). Thomas further testified that he was skeptical concerning what the Appellant had told him (Transcript, Volume IX, Page 2142). After Thomas learned of the Anthonys' deaths, he turned the umbrella over to the police (Transcript, Volume IX, Page 2147).

On this same evening (February 26, 1974), Jeanette Mason was visiting her boyfriend, Coley Smith, at Smith's

parents house on South Hawkins Avenue. At approximately 10:30 p.m., the Appellant came to the Smith residence, by himself, driving a white and black Cadillac (Transcript, Volume VII, Pages 1685, 1713). The Appellant's conversation concerned getting some money, and Church's Chicken was discussed as a possible target (Transcript, Volume VII, Pages 1686, 1713). After five or ten minutes, the Appellant left the Smith house alone. The Appellant, still driving the white over black Cadillac, arrived at Sam Howze's house, on Bishop Street, at approximately 11:00 p.m. (Transcript, Volume VII, Page 1592). After briefly stopping at the Hanna Cafe (operated by Howze's father), the Appellant, accompanied by Howze, drove two "dudes" to the north side of town in the Cadillac (Transcript, Volume VII, Pages 1593-1594).

Upon Howze's first inquiry about the car, the Appellant told Howze not to worry because the car was not hot (Transcript, Volume VII, Page 1593). On the return trip from the North side, however, the Appellant told Howze that he got the car from some people at the K-Mart (Transcript, Volume VII, Page 1595). The Appellant further stated that he put the people in the trunk and transported them to Perkins Park (Transcript, Volume VII, Page 1595). After the man "tried to play hero", the Appellant stated that he shot them (Transcript, Volume VII, Pages 1595-1596). The Appellant and Howze returned to the Hanna Cafe where the Appellant

made further statements that the people could be found in Perkins Park (Transcript, Volume VII, Pages 1596-1597). After spending approximately half an hour to 45 minutes in the bar, the Appellant and Howze took the Cadillac and went to Coley Smith's house. On the way over to Smith's house, Howze, still not believing the Appellant's story, was shown the gun by the Appellant (Transcript, Volume VII, Page 1598). Howze, knowing the gun had been fully loaded in the early evening (5 shot revolver), discovered that only three live rounds were still in the gun (Transcript, Volume VII, Pages 1610, 1654).

Upon arriving at the Smith residence (approximately 12:30 a.m. on February 27, 1974), Jeanette Mason and Coley Smith got into the Cadillac with the Appellant and Howze, whereupon the Appellant proceeded to drive Mason home (Transcript, Volume VII, Pages 1599-1600). The route to Mason's house took the four through Perkins Park. Upon entering the Park, the Appellant told Howze "they are over there". A short time later, Jeanette Mason noticed what she described as someone lying in the park wearing something red (Transcript, Volume VII, Page 1689). Mason told the Appellant that there was a man lying in the woods and asked him to stop so they could check (Transcript, Volume VII, Page 1689). The Appellant replied in the negative, stating that he had already seen it and that it was only some trash or garbage (Transcript, Volume VII, Pages 1669, 1716).

The four continued through the park arriving at Mason's apartment. Mason was dropped off and the Appellant drove Howze and Smith back to the Howze residence. After obtaining a bottle of wine, and after discussing getting some money, the Appellant and Smith left in the Cadillac (approximately 1:00 a.m.) leaving Howze at his mother's house (Transcript, Volume VII, Pages 1602-1605).

The Appellant and Smith drove around, eventually ending up at Church's Chicken on Copley Road. During this period of driving around, Smith asked the Appellant if he had strangled the man in the park. The Appellant answered no, and pulled the pistol out and clicked the hammer back. The Appellant then stated that it was a man and lady and that "he touched the lady and it sounded like she was coming back alive so he cut out" (Transcript, Volume VII, Page 1719).

When the Appellant and Smith arrived at Church's Chicken, they both approached the building and asked to use the phone (Transcript, Volume VII, Page 1721). The Appellant and Smith then left, returning a short time later after parking the Cadillac on a side street (Transcript, Volume VII, Page 1723). By this time, Church's Chicken was closed (2:00 a.m.) and the manager, along with a female employee who he was taking home, was leaving in his car (Transcript, Volume VII, Page 1761). At this point, the Appellant approached the manager's car, pulled a gun, and requested money (Transcript, Volume VII, Page 1765). After learning

that the money was locked up inside the carry out, the Appellant directed the manager, at gunpoint, back into the restaurant (Transcript, Volume VII, Pages 1724, 1775-1776).

While the Appellant and the manager were in the carry out, Smith, who was in the bushes beside the restaurant, instructed the female employee, in the manager's car, to stay put and she wouldn't get hurt (Transcript, Volume VII, Pages 1723-1725).

When the Appellant returned with the manager, and after obtaining the money, the Appellant locked the manager in the trunk of his own car (Transcript, Volume VII, Page 1726). The Appellant gave the keys to the girl inside the car and told her to leave the manager out when they were gone (Transcript, Volume VII, Pages 1727, 1770-1771).

The Appellant and Smith then returned to the Smith residence where the Appellant gave Smith $90.00 of the robbery proceeds from Church's Chicken (Transcript, Volume VII, Pages 1727-1728). After approximately 15 minutes, the Appellant left Smith's house, in the Cadillac, by himself (Transcript, Volume VII, Page 1728). The Appellant then returned to the Howze residence where he told Howze that he got the money and displayed a roll of currency (Transcript, Volume VII, Page 1606). After a short time, the Appellant left by himself, still driving the Cadillac (Transcript, Volume VII, Pages 1606-1607).

Shortly before 3:30 a.m., on February 27, 1974, Sam Howze called the Akron Police to report two dead people in Perkins Park (Transcript, Volume VII, Page 1660; Volume VIII, Page 1796). Howze met two Akron Detectives at the corner of Bishop and Cedar Streets (location of Hanna Cafe) and subsequently turned over some credit cards and personal papers of Paul D. Anthony (Transcript, Volume VIII, Page 1802). Howze testified that the Appellant gave him the credit cards and papers earlier in the evening (Transcript, Volume VII, Pages 1609, 1622-1623). Two detectives and uniformed police personnel, along with Howze, then proceeded to Perkins Park to search for the bodies, (Transcript, Volume VIII, Pages 1796-1798). The bodies of a male and female were found in the park, lying side by side, face down (Transcript, Volume VIII, Page 1799). The bodies subsequently identified as those of Mr. and Mrs. Paul Anthony, each had a single bullet wound inflicted to the back of the head. The Summit County Coroner testified that Mr. Anthony died instantaneously, the cause of death being a gunshot wound which severed the brain stem (Transcript, Volume IX, Page 2050). Mrs. Anthony, died of a gunshot wound directly into the brain (Transcript, Volume IX, Page 2061), the time of death being approximately five to ten minutes after the infliction of the wound (Transcript, Volume IX, Page 2067). The wounds to each body were caused by a weapon with the barrel in contact with the scalp

(Transcript, Volume IX, Pages 2045, 2055).

As the murder scene was processed, a crucifix was found near the leg of Mr. Anthony (Transcript, Volume IX, Page 1791), and a rosary, partially in a case, was found between his legs (Transcript, Volume I, Page 270).

Detective William A. Bullock, upon reporting for day shift duty at the Akron Police Department on February 27, 1974 (7:45 a.m.), was immediately ordered to proceed to 659 Dorothy Avenue and attempt to locate the Appellant. Bullock, with other Akron Dectective, went to the Dorothy Avenue address, having in his possession a burglary warrant, for the Appellant, executed on February 1, 1974 (Transcript, Volume I, Page 112). Prior to learning that the Appellant was a murder subject, Bullock, having been familiar with the Appellant in the past (the Appellant, prior to the Anthony killings, had previously been in the custody of the Ohio Youth Commission in Columbus, for a murder he committed when he was fourteen (Transcript, Volume IX, Page 2190)), testified that he had not gone directly to the Bayless residence for fear of tipping the Appellant that he was wanted for burglary (Transcript, Volume I, Page 121). After the execution of the burglary warrant (February 1, 1974), Bullock had kept Dorothy Avenue under surveillance (checking for Appellant's car), and had notified the uniform police of the outstanding warrant (Transcript, Volume I, Page 121). Bullock further testified that his confidential information led him to

believe that the Appellant was in Columbus, causing him to send a warrant copy to the Columbus Police Department.

Upon arrival at 659 Dorothy Avenue, on the morning of February 27, 1974, Det. Bullock and Det. Sgt. Cross approached the front door where Bullock observed, through the door glass, the Appellant in the dining room (Transcript, Volume I, Page 113; Volume VIII, Page 1894). Other detectives were sent to cover the rear of the house. Bullock and Cross were greeted at the front door by the Appellant's grandmother, Ada Bayless (Transcript, Volume I, Pages 113-114; Volume VIII, Page 1894). Bullock explained to the grandmother that he wanted to talk to her grandson and that they had a warrant (Transcript, Volume I, Page 114). Mrs. Ada Bayless stated that her grandson was home and that since he had left the dining room area she would help them look for him (Transcript, Volume I, Pages 77, 115). The grandmother further stated that the officers were free to look anywhere in the house (Transcript, Volume I, Page 115).

The Bayless house was divided into two separate living quarters, the Appellant's mother, Bernice Bayless, occupying the second floor. The basement and unfinished third floor were used in common for storage purposes (Transcript, Volume I, Page 107).

Ada Bayless testified that she led the officers to the basement stating, "Come on, we'll go down here and call him" (Transcript, Volume I, Page 80). Once in the basement,

Ada Bayless stated, "Help yourself; look any place you want to" (Transcript, Volume I, Page 80). By this time more officers had arrived and were assisting in the search.

When the Appellant was not found in the basement, Mrs. Bayless suggested he may have gone out the back door (Transcript, Volume I, Page 81). After learning that police were stationed outside the back door, the grandmother took the officers to the third floor (Transcript, Volume I, Page 81). The Appellant still was not located, and the grandmother and officers returned downstairs. After another basement search, Mrs. Bayless declared: "If you said he can't get out, then let's go back to the third floor" (Transcript, Volume I, Page 83).

At this time, the Appellant was discovered, armed with a pistol, hiding under the eaves in the unfinished third floor storage area (Transcript, Volume I, Page 116). Upon discovery, the Appellant told the officers: "You get out. I have five bullets; I'll kill all you mother fuckers" (Transcript, Volume IX, Pages 2070, 2102). Bullock then told the Appellant: "I have a warrant for burglary for you". The Appellant then stated: "I know what you want me for, the murder of those two people in the park" (Transcript, Volume VIII, Page 1899).

The officers allowed the Appellant's grandmother to talk to the Appellant in order to effect a surrender (Transcript, Volume VIII, Pages 1899-1890). The mother,

Bernice Bayless, who was brought from her employment at General Hospital, was finally able to convince the Appellant to surrender (Transcript, Volume VIII, Pages 1900-1901).

The Appellant threw down his gun, came out of the attic loft, with his hands up, and was immediately taken into custody and removed from the scene by Detective Bullock (Transcript, Volume VIII, Page 1901).

Detective Sehika, immediately upon the Appellant's removal from the attic loft, discovered the Appellant's gun by the use of a flashlight (Transcript, Volume I, Page 153; Volume IX, Page 2094). Officer Conley, as soon as the attic was cleared, discovered several items, with the use of a flashlight, between the rafters where the Appellant had been hiding (Transcript, Volume I, Page 146; Volume IX, Page 2071). Laying in the second bay of exposed rafters was a wallet containing $319.00 and a Church's Chicken receipt, a watch, a voter's registration card in the name of Paul P. Anthony, and a credit card containing the name Kucko-Hecker (Transcript, Volume I, Page 147; Volume IX, Page 2072). From the testimony and photographs (State's Exhibit 43 and 45), it is evident that these items, along with the gun, were found in plain view by the use of a flashlight (Transcript, Volume IX, Pages 1829, 2074, 2098-2099).

After the Appellant was apprehended, a white over black Cadillac, belonging to Paul Anthony, was found near the Appellant's house, at 660 Bellevue Avenue (Transcript,

Volume IX, Pages 2097, 2106). This automobile was processed for fingerprints, and a print of the Appellant's was found on the steering wheel (Transcript, Volume VIII, Page 1842).

After the Appellant was taken into custody, a ladies Timex watch was found in his right front pocket (Transcript, Volume IX, Page 2150). Because of Roman numerals on the dial, David Anthony, a son of Mr. and Mrs. Paul Anthony, identified the watch as belonging to his mother (Transcript, Volume IX, Pages 2164-2165). The Appellant was also wearing a wedding band inscribed with the initials "PPA" to "PAK" (Transcript, Volume IX, Page 2157). While David Anthony could only testify that this wedding band was similar to the one his mother wore, he did testify that his father's full name was Paul Peter Anthony, and his mother's maiden name was Patricia Ann Kutsko (Transcript, Volume IX, Page 2165). The Appellant had told the police that this wedding band belonged to him (Transcript, Volume IX, Page 2158).

The pistol that had been found in the attic loft contained two live cartridges, one a wadcutter (flat nosed), the other a manufactured "Super Vel" (Transcript, Volume IX, 2095). Expert testimony was offered by the State (Transcript, Volume VIII, Pages 1960-1985) indicating that the wadcutter bullet, found in the weapon, was hand cast (not manufactured) before being made into a hand loaded cartridge. An unusual special lubricant was also used in reloading the wadcutter found in the Appellant's

weapon. After firing the wadcutter cartridge in the Appellant's pistol, a ballistics expert testified that this bullet compared to the bullets taken from the heads of Mr. and Mrs. Paul Anthony, by physical characteristics, mold characteristics, rifling class characteristics, and lubricants (Transcript, Volume VIII, Page 1985).

Peter Anthony, one of the six children of Mr. and Mrs. Anthony, testified that his father was president of Kucko-Hecker Funeral Home. Peter Anthony further testified that on February 26, 1974, at approximately 7:00 p.m. was the last time he saw his parents alive (Transcript, Volume VII, Page 1560). At this time, Mr. and Mrs. Anthony were leaving their Wadsworth home in their white over black Cadillac, to visit Grandfather Kucko, who was in the hospital. Peter Anthony further testified that when his parents were in Akron, they often shopped at the Arlington Plaza or the K-Mart at Wooster Hawkins (Transcript, Volume VII, Pages 1560-1561).

The State also presented testimony of Mrs. Marian Smith under Ohio's "Other Acts Doctrine". Mrs. Smith testified that she was abducted from the Chapel Hill Mall, in her own car, by the Appellant, four days before the Anthony killings. While driving, the Appellant robbed Mrs. Smith at gunpoint. The Appellant then put Mrs. Smith in the trunk of her car, continued driving, and then subsequently abandoned the car with Mrs. Smith still in the trunk (Transcript, Volume VIII, Pages 2014-2029).

As part of the defense, the Appellant presented Dr. Kinsley, a psychologist. The Appellee strongly disagrees with the Appellant's statement that Dr. Kinsley determined that the Appellant was mentally deficient and criminally insane (Appellant's brief page 5). The transcript indicates that Dr. Kinsley concluded that the Appellant, while having an emotional defect, was not criminally insane and that he was not mentally deficient (Transcript, Volume IX, Pages 2231, 2242-2245).

The Appellant testifying in his own defense, indicated that he gave his gun to Sam Howze for the purpose of robbing the Anthonys at the K-Mart. At this time, the Appellant testified that he (Appellant) was driving the yellow Oldsmobile of Elijah Thomas, which he had allegedly borrowed earlier in the evening (Transcript, Volume X, Page 2283). As indicated in the Appellant's brief, the Appellant testified that after Howze abducted the Anthonys, he (Appellant) was unable to keep up with the Cadillac (containing the Anthonys and Howze). The Appellant stated that when he arrived at Perkins Park, as planned, Howze emerged from the park, in the Cadillac without the Anthonys. The Appellant explained that the civilian and police witnesses, testifying against him, were lying (Transcript, Volume X, Pages 2266-2329). The Appellant also admitted lying in his original statement given to the police (Transcript, Volume X, Pages 2309-2322).

As a rebuttal witness, the State presented Elijah Thomas, the owner of the yellow Oldsmobile that the Appellant was allegedly using on the evening of February 26, 1974. Thomas, an employee of the Brecksville V.A. Hospital, testified that he did own a yellow Oldsmobile. Thomas stated, however, that he never loaned his car to the Appellant on February 26, 1974 (Transcript, Volume XI, Page 2427). Thomas testified that he had loaned the Appellant the Oldsmobile on February 23. Thomas was sure of the dates because February 23 was his wife's birthday (Transcript, Volume XI, Page 2427).

The Appellant's jury found him guilty of the Church's Chicken robbery, and guilty of the aggravated murders of Paul and Patricia Anthony. Accompanying each aggravated murder conviction were two separate findings of specifications (felony-murder and murder of two or more persons), as provided for in Revised Code Section 2929.04(A).

The trial court, after conducting a mitigation hearing, found no mitigating circumstances and sentenced the Appellant to death, as required by Revised Code Section 2929.03(E).

PETITIONER'S FIRST REASON FOR GRANTING THE WRIT

SUB-PART B

THE OHIO DEATH PENALTY STATUTES PLACE UNCONSTITUTIONAL LIMITATIONS UPON THE CONSIDERATION OF MITIGATING CIRCUMSTANCES.

The only capital offense in Ohio under its new criminal code is Aggravated Murder. The death penalty is precluded unless a person is convicted of Aggravated Murder, and an additional aggravating specification, by the trier of the facts. Ohio Revised Code, Sections 2903.01, 2929.03, and 2929.04(A).

The death penalty is only considered at the sentencing stage if a person is convicted of both the principal charge and the specification. If a person is convicted in such a manner, a separate hearing is conducted to consider mitigating factors, as set out in Ohio Revised Code, Section 2929.04(B).

> (B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
>
> (1) The victim of the offense induced

or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The Supreme Court of Ohio automatically reviews all cases in which the death penalty has been imposed. Ohio Constitution. Article IV, Section 2.

Petitioner contends that Ohio's capital punishment statute has the same deficiencies as were found to exist in North Carolina and Louisiana. Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), Cf. Roberts v. Louisiana, 45 L.W. 4584 June 7, 1977. Those state capital punishment statutes were struck down because they had mandatory death sentences for certain classes of offenders, regardless of the circumstances of the offender.

However, an analysis of Ohio's capital punishment statute shows that it is similar to that of Florida. Fla. Stat. Ann., section 791.141. Proffitt v. Florida, 428 U.S. (1976). The sentencing procedure is at a bifurcated hearing, which only occurs after the trier of facts has found that the offender has committed aggravated murder with a particular specification, beyond a reasonable doubt. At the mitigation hearing any relevant evidence may be produced.

The Ohio Supreme Court has held that:

> Syllabus 2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R.C. 2929.04(B)(2) and (3) was established by a preponderance of the evidence. State v. Bell (1976) 48 Ohio St.2d 270.

While youth of the offender, and his lack of a prior criminal record are not specifically enumerated as separate mitigating factors they are considered by the Ohio Courts. Jurek v. Texas, 428 U.S. 262 (1976), upheld Texas' capital punishment statute even though none of the particularized mitigating factors were enumerated. The constitutionality of the Texas procedures was sustained because they allowed consideration of mitigating factors. Jurek v. Texas, 262, 271-272.

Additionally the Ohio Supreme Court has stated:

1. For the purpose of the mitigation inquiry, the words "psychosis or mental deficiency," as contained in R.C. 2929.04(B)(3), authorize the trial judge or panel to use the broadest possible latitude in determining the defendant's mental state or capacity.

2. Under R.C. 2929.04(B)(3), a convicted defendant's mental state or capacity should be considered in light of all the circumstances, including the nature of the crime itself, so that it may be determined whether the condition found to have existed was the primary producing cause of his offense. State v. Black (1976), 48 Ohio St.2d 262.

Since Ohio has three specific mitigating factors enumerated and considers other mitigating factors in the same manner as Texas, Respondent submits that there are no constitutional infirmities in the mitigation portion of its capital punishment statute.

The Ohio Supreme Court has reviewed approximately twenty death sentences, and reversed only one (State v. Lockett (1976), 49 Ohio St.2d 71 which originated from Summit County). However, of the total number of cases (28) from Summit County in which a defendant was charged with a capital offense, only thirteen reached the mitigation state. Five of those defendants including the Petitioner now face the death penalty. Thus, it can be seen that a court can and does apply the mitigating factors where they are applicable.

Petitioner fails to show how the factors he complains of with respect to mitigation even apply to him. The State submits that his record, the nature of the crime, and all the other circumstances surrounding the Petitioner weigh heavily against, not for mitigation.

In summary, Ohio's capital punishment statute is not mandatory, and allows the broadest possible consideration of the defendant's mental state, age, and his circumstances including the nature of the crime in determining the applicability of the death sentence.

SUB-PART C

THE OHIO DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THEY DENY THE CAPITALLY ACCUSED THE RIGHT TO A JUDGMENT OF HIS PEERS AS TO THE EXISTENCE OF MITIGATING CIRCUMSTANCES, AND THE APPROPRIATENESS OF THE PENALTY OF DEATH.

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illionois, 391 U.S. 510, 519 n. 15, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistencing in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. Proffitt v. Florida, supra.

It is a somewhat analomous argument to say that juries will sentence more even handedly than judges in capital cases. Juries do not ordinarily take part in the sentencing procedures in our system of criminal justice. They have a one shot opportunity to exercise this function. To say that they will be less arbitrary, and capricious than a trial judge who is experienced in the area of sentencing as it applies to the entire milieu of criminals, defies logic. A jury does not have the ability to compare the offender before it, with the other defendants similarly situated.

Petitioner facilely remarks that jury nullification is minimized by taking unbridled jury discretion away from juries in the face of mandatory death penalties, but implies that Ohio has a problem with jury nullification. That argument is specious for two reasons. First, Ohio does not have a mandatory death penalty. Second, the jury does not make the sentencing decision.

Petitioner asserts that the jury should have the opportunity to weigh the aggravating and mitigating factors. It should be emphasized again, that the jury does determine the presence or absence of aggravating specifications. The jury considers the more factual aspects of the death penalty decision in considering whether a specification exists, or not. For example, in the instant case the jury found that the Petitioner killed two or more people. Ohio Revised Code Section 2929.04(A)(5)(Specification).

Before the mitigation hearing the trial court is required to have a pre-sentence investigation and a psychiatric examination made. Ohio Revised Code Section 2929.03(D). These reports provide a wealth of information concerning "the character, conduct and record of the individual offender. Thus the judge considers the usual sentencing criteria, in the mitigation hearing. The defendant has the advantage of a jury

making statutorily guided decisions, and a judge evaluating him on an individual basis before the imposition of the death penalty.

If this Court determined that Florida's capital punishment statute withstood constitutional muster, Proffitt v Florida, supra, then Ohio's statute should likewise meet the Court's review. Florida's statute allowed the judge to weigh both the aggravating, and mitigating factors. In Ohio, the jury has already determined that an aggravating factor existed beyond a reasonable doubt. Accordingly, one must conclude that Ohio has gone further than the Supreme Court has required, in allowing the jury to take part in a portion of the death penalty decision making process. Since there is no constitutional requirement that a jury must take part in the sentencing process, Petitioner's argument herein is without merit.

SUB-PART D

OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSIBLY PENALIZE EXERCISE OF THE RIGHT TO TRIAL BY JURY.

Petitioner misapplies United States v. Jackson, 390 U.S. 570 (1968). That case held that a federal statute had an impermissibly chilling effect upon the right to trial by jury because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

This is not the case in Ohio. Under the Ohio statute, the death penalty is applicable whether trial is by jury or a three judge panel. The death penalty may be avoided under either choice.

The chilling effect on the right to trial by jury found in United States v. Jackson, supra, is simply not present in this case. Petitioner's conclusion that there is a more lenient sentencing standard for a three judge panel is unsupported. Whether there are three judges or one judge, they are presumed to follow the law.

SUB-PART E

OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSIBLY SHIFT TO THE DEFENDANT CONVICTED OF AGGRAVATED MURDER WITH SPECIFICATIONS THE BURDEN OF PROVING FACTS WHICH DISTINGUISH THOSE WHO MAY LIVE AND THOSE WHO MUST DIE.

Mullaney v. Wilbur, 421 U.S. 684 (1975) held that the Due Process Clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The Court held that the Maine statute requiring the defendant to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter, violated this requirement, and that in fact the State was required to prove the absence of this fact.

Respondent strongly contends that the rule of law enunciated in Mullaney does not apply to sentencing. One can readily distinguish proof of an element of a crime, from evidence presented at sentencing. The former is a presentation of the facts necessary to support each element of the crime. The Respondent accepts the burden of proving each element of the crime of aggravated murder beyond a reasonable doubt. It did so in this case.

However, sentencing and the procedures therein are a different matter. As in Florida, the Ohio statute requires the trial judge to find that. In determining that the death sentence should be imposed, the trial judge need

only find that the mitigating factors are insufficient to outweigh the aggravating factors. Fla. Stat. Ann., section 921. 141(3) (Supp. 1976-1977). Even when the jury recommends life, the trial judge may impose the death penalty where the facts supporting the death penalty are so clear and convincing that "Virtually no reasonable person could differ". Tedder v. State, 322 So.2d 908, 910 (1975).

The Respondent submits that there is no support for Petitioner's contention that the State must maintain the burden of proof beyond a reasonable doubt. To the contrary, this Court sustained Florida's capital sentencing structure, which requires the trial judge to find that the mitigating factors outweigh the aggravating factors. Proffitt v. Florida, supra.

PETITIONER'S SECOND REASON FOR GRANTING THE WRIT

PETITIONER SHOULD NOT BE PUT TO DEATH WITHOUT THE VOTE OF THE PEOPLE OF OHIO.

The elected representatives of the people, reflecting their will, enacted a statute providing for capital punishment as set out in Proposition I. A jury selected according to law found the Petitioner guilty of a capital offense, and he was sentenced to death by the trial court.

If Petitioner is serious in his request for a plebiscite and elects to forego any judicial remedies, a referendum on whether Carl Lamont Bayless should be put to death would be a swift and just end to this issue.

PETITIONER'S THIRD REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS DENIED BY THE TRIAL COURT'S REFUSAL TO GRANT HIS CHANGE OF VENUE MOTION MADE ON GROUNDS OF PREJUDICIAL PRE-TRIAL PUBLICITY.

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.... Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom... But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." (Emphasis added). Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966).

At the outset of the prosecution of this case (March 11, 1974) the trial judge took "strong measures" to control the publicity naturally engendered by this case (Transcript, Volume I, Pages 7-8).

The trial judge acknowledged that the public had a constitutional right to be informed of the trial court proceedings. At the same time he exerted control over the officer's of the court, and by informing the press of his position regulated their activities to that extent (Transcript, Volume II, Pages 281-282).

Petitioner incorrectly equates any pretrial publicity with the "circus atmosphere" found in Sheppard. The publicity, as indicated by Petitioners list of Beacon Journal headlines is totally dissimilar from the facts involved in Sheppard as outlined by the United States Supreme Court, in its Syllabus:

> ...During the entire pre-trial period virulent and incriminating publicity about petitioner and the murder made the case notorious, and the news media frequently aired charges and countercharges besides those for which petitioner tried. Three months before trial he was examined for more than five hours without counsel in a televised three-day inquest conducted before an audience of several hundred spectators in a gymnasium. Over three weeks before trial the newspaper published the names and address of prospective jurors causing them to recieve letters and telephone calls about the case. The trial began two weeks before a hotly contested election at which the chief prosecutor and the trial judge were candidates for judgeships. Newsmen were allowed to take over almost the entire small courtroom, hounding petitioner, and most of the participants. Twenty reporters were assigned seats by the court within the bar and in close proximity to the jury and counsel, precluding privacy between petitioner and his counsel. The movement of the reporters in the courtroom caused frequent confusion and disrupted the trial; and in

> the corridors and elsewhere in and around the courthouse they were allowed free rein by the trial judge. A broadcasting station was assigned space next to the jury room. Before the jurors began deliberations they were not sequestered and had access to all news media though the court made "suggestions" and "requests" that the jurors not expose themselves to comment about the case. Though they were sequestered during the five days and four nights of their deliberations, the jurors were allowed to make inadequately supervised telephone calls during that period. Pervasive publicity was given to the case throughout the trial, much of it involving incriminating matter not introduced at the trial, and the jurors were thrust into the role of celebrities. At least some of the publicity deluge reached the jurors. At the very imception of the proceedings and later, the trial judge announced that neither he nor anyone else could restrict the prejudicial news accounts. Despite his awareness of the excessive pretrial publicity, the trial judge failed to take effective measures against the massive publicity which continued throughout the trial or take adequate steps to control the conduct of the trial....

When the tight control exerts over the instant trial, by Judge Barbuto, is compared with the Sheppard facts, any conceivable analogy is destroyed. Furthermore, at the Appellant's request, the trial court determined that the jurors followed the courts publicity admonitions throughou the trial (Transcript, Volume XI, Pages 2538-2540).

The Appellant argues in the alternative that the trial court should have granted a continuance because of publicity. While the trial court is under a legislative

mandate to try an incarcerated defendant within ninety days (R.C. 2945.71), no exception is provided for a publicity continuance. Furthermore, the Appellant's initial concern for a continuance was reference trial preparation and not publicity (Transcript, Volume I, Pages 33-39).

The trial court followed a time tested procedure in selecting a jury that was free from the adverse affects of any pretrial publicity. Vigorous individual voir dire on this issue resulted in a large number of prospective jurors being eliminated for cause. See, Nebraska Press Association v. Stuart, ___U.S.___ 49 L.Ed.2d 683, 96 S. Ct. 2791 (1976); Sheppard v. Maxwell, supra; United States v. Burr, 25 Fed. Cas. 47 (C.C. 1807).

Petitioner's analysis of the publicity issue is faulty for another reason. A juror's pretrial knowledge of a particular case is not per se, a ground for change of venue.

> Juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged does not, standing alone, presumptively deprive the defendant of due process. Syllabus 8, Nebraska Press Assoc. v. Stuart, supra.

The ultimate question answered by all the jurors was that they could decide the question of Petitioner's guilt or evidence, based on the evidence, not on the publicity.

Additionally, throughout the trial, the court clearly instructed the jurors not to discuss, or listen to

any discussion or report concerning this case.

The Respondent submits that the record reveals that the Petitioner's right to a fair trial was not denied by holding his ruling in abeyance pending voir dire of the jurors. See, State v. Fairbanks, 32 Ohio St.2d 34 (1972); State v. Tingler, 31 Ohio St.2d 100 (1972). Once that voir dire was conducted it was established that a fair trial could be conducted, and the change of venue became unnecessary.

PETITIONER'S FOURTH REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF EIGHT VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner claims that eight veniremen were improperly excluded for cause because of their views on capital punishment. Petitioner sets out a portion of one of the excused veniremen's answers in his brief. Petitioner's brief, pages 47-48. Petitioner did not include the entire transcript of this prospective juror's answer. To clarify Mrs. McGinnis' position, the remaining answers are set out below:

> Q. As the Court has said he has been charged with aggravated murder. In the event the State of Ohio proves both the charge and specifications in this case, in event that they prove both, the question of capital punishment or death in the electric chair will come into consideration. Now, are you opposed to capital punishment?
>
> A. Yes, sir, I am.
>
> Q. And how long have you had this feeling?
>
> A. Ever since I can remember, I guess.
>
> Q. Are there any circumstances in which you feel that capital punishment should be invoked?
>
> A. Well, I have always thought there would be another way instead of capital punishment.

Q. Well, let me say this to you. If the facts in this particular case were such, could you vote for the consideration of the electric chair?

A. I might, but I don't know.

Q. Then your feeling against capital punishment is not firm, is that what you're saying?

A. Yes. What I mean is, I think there should be - there could be life imprisonment, something like that, instead of capital punishment.

Q. Instead of?

A. Yes.

Q. You would prefer that?

A. Yes, I would.

Q. Is that what you're saying?

A. Yes.

Q. But do you also feel that there are circumstances in which death in the electric chair should be invoked?

A. I don't think so.

Q. You don't think there's any case in which a person should be sent to the electric chair?

A. I don't think so.

MR. GABALAC: Challenge for cause, Your Honor.

MR. HOLLAND: Object to the challenge until I ask further questions.

By the Court:

Q. Is there any circumstance or circumstances in which you would change

your mind?

A. I doubt it.

Q. You have had this feeling for a number of years, you say?

A. Yes, I have.

Q. Have you discussed this with other people?

A. Well...

Q. And expressed your views in regard to this?

A. If it came up, I did. I have.

Q. Is this because of religious belief or any other?

A. No, it's just because I don't believe any life should be taken. I don't believe we should take each other's life. I think there should be other ways to figure out.

COURT: You may inquire, Mr. Holland.

EXAMINATION BY MR. HOLLAND:

Q. This then, Mrs. McGinnis, is a feeling of morality that you have?

A. I guess. I think I grew up with it.

Q. It's a moral scruple?

A. Yes.

Q. And it's sort of in line with Thou shalt not kill?

A. That's right.

Q. Notwithstanding this general objection or opposition to capital punishment, if His Honor were to administer an oath to you whereby you would be obliged to follow the law as he instructs you the

law exists, would you follow that oath even though you personally had objections to capital punishment, could you do your duty and follow his oath?

A. You mean if it was absolutely my duty to say that he should be electrocuted?

Q. Yes.

A. Would I say that?

Q. Even though it could cause Carl's death, could you faithfully perform duties of a juror in accordance with His Honor's oath and in accordance with the instructions he gives you about what the law is and how you are to follow the law?

A. I don't think. I don't think so.

COURT: The Court will excuse you for cause. You may be excused.

MR. HOLLAND: Objection.

COURT: Thank you very much, Mrs. McGinnis.

(Excused)"

Petitioner does not set out any other examples, and only gives one of the remaining seven veniremen he claims were improperly excluded. A review of the transcript shows that each prospective juror excused for cause, stated that they could not set aside their views opposing capital punishment, and follow the law, regardless of the circumstances. See, for example: Douglas Reiser, Transcript, Volume II, Pages 310-313; Florence Billich, Volume IV, Pages 903-911; Elsie Curry, Volume V, Pages 1143-1153; Charles Boheme, Volume VI, Pages 1301-1312.

This Court stated the principle of law applicable, in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S. Ct., 46 Ohio Ops.2d 368, and recently restated in Davis v. Georgia, ___U.S.___, 50 L.Ed.2d 340 as follows:

> 2. Unless a venireman in a capital case is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings, he cannot be excluded for cause; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

The prospective jurors excused on this ground had more than a general objection to capital punishment. For example, Mrs. Koltnow stated that she was opposed to capital punishment; and responded to the following questions:

> Q. Under any circumstances do you feel that society should take a life?
>
> A. No.
>
> . . . . .
>
> EXAMINATION BY MR. GABALAC:
>
> Q. Mrs. Koltnow, if the Judge were to charge you that the law in Ohio is and that law might include the taking of a defendant's life, could you set aside your moral beliefs and follow the law of the Court, or do you feel that your moral beliefs and principles are stronger in you than your obligation to follow the law?
>
> A. I think my moral obligations are very important to me.

Q. For that reason you wouldn't be able to follow the Court then if he were to instruct you on the law, if it were to result in taking someone's life?

A. That's right.
Volume III, Transcript, Pages 719-720.

Other prospective jurors excused for their views on capital punishment gave similar responses. Accordingly, Respondent contends that the veniremen were properly excused within the dictates of Witherspoon.

CONCLUSION

The Respondent respectfully requests this Court, pursuant to the Argument offered, to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

STEPHAN M. GABALAC
Prosecuting Attorney

Carl M. Layman III

CARL M. LAYMAN III
Assistant Prosecuting Attorney
Appellate Review Division
City-County Safety Building
53 East Center Street
Akron, Ohio 44308

216/379-5510

CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do hereby certify, pursuant to Supreme Court Rule 33(3)(b), that one copy of the Respondent's Answer to Petitioner's Writ for Certiorari was mailed, first class postage paid, to WILLIAM R. HOLLAND, Attorney for Petitioner, 913 Centran Building, Akron, Ohio 44308 .

Carl M. Layman III

CARL M. LAYMAN III
Assistant Prosecuting Attorney
Appellate Review Division
City-County Safety Building
53 East Center Street
Akron, Ohio 44308

216/379-5510